

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**OCTAVIO GARCIA, *Applicant***

**vs.**

**FANTASY ACTIVE WEAR, INC.; STARNET INSURANCE COMPANY,  
administered by, BERKLEYNET *Defendants***

**Adjudication Numbers: ADJ13584402, ADJ13584403  
Los Angeles District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the “Joint Findings of Fact and Orders” (F&O) issued on April 22, 2021, by the workers’ compensation administrative law judge (WCJ). The WCJ found that the orthopedic surgery qualified medical evaluator (QME) panel number 7380673 is the proper panel QME to evaluate applicant in these matters and rejected applicant’s requested Chiropractor panel, which was obtained after the orthopedic surgery panel issued.

Applicant contends, in pertinent part, that defendant’s panel is invalid because defendant failed to follow Rule 30(b)(1)(C) (Cal. Code Regs., tit. 8, § 30(b)(1)(C),) when it served the orthopedic surgery panel, because defendant failed to include a copy of the supporting documentation uploaded with the panel request.

We have not received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we dismiss the petition for reconsideration and deny the petition for removal.<sup>1</sup>

---

<sup>1</sup> The WCJ’s Report raises an issue as to whether the petition for reconsideration was timely filed. The date of service of the F&O is not entirely clear in the record. We have accepted the petition as timely as it is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox v. Workers' Comp. Appeals Bd.*, (1992) 4 Cal. App. 4th 1196, 1205 [6 Cal. Rptr. 2d 252, 57 Cal.Comp.Cases 149].

We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. Based on our review of the record, for the reasons stated by the WCJ in her Report and for the reasons discussed below, as our Decision After Reconsideration we will affirm the April 22, 2021 F&O.

## **FACTS**

In ADJ13584402 applicant worked for defendant on October 28, 2019 when he alleged a specific injury to his left shoulder, left elbow, and left arm. (Minutes of Hearing and Summary of Evidence, April 5, 2021, p. 2, lines 22-25.) In ADJ13584403 applicant alleged cumulative injury through the period ending on March 19, 2020, to his bilateral arms, bilateral hands, fingers, back, bilateral shoulders, waist, and bilateral upper extremities. (*Id.* at p. 2, lines 10-13.)

On December 2, 2020, defendant denied both claims serving separate letters on applicant for each claim. (See Defendant's Exhibits B and C.) Applicant does not dispute receiving the denial letters.

Defendant thereafter requested an orthopedic surgery panel on December 18, 2020. (Defendant's Exhibit A, PQME panel number 7380673, December 18, 2020.) Defendant did not attach and serve a second copy of its denial letter when it served the panel upon applicant. (See generally, *id.*)

Applicant used the denial letters as the basis for requesting a chiropractic panel on December 28, 2020. (Applicant's Exhibit 5, PQME panel number 7361653 with attached request, December 28, 2020.)

The sole issue is whether defendant's request for a QME panel, which was first in time, is invalid.

## **DISCUSSION**

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.*

(*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra.*)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra.*) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Here, based upon the WCJ's analysis of the merits of the petitioner's arguments, and for the reasons discussed below, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Substantial justice is "[j]ustice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." (Black's Law Dictionary (7th ed. 1999).)

The workers' compensation system “was intended to afford a simple and nontechnical path to relief.” (*Elkins v. Derby* (1974) 12 Cal. 3d 410, 419 [115 Cal. Rptr. 641, 525 P.2d 81, 39 Cal. Comp. Cases 624]; Cf. Cal. Const., art. XX, § 21; § 3201.) Generally, workers’ compensation proceedings have informal pleading requirements. (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal. 3d 848, 852 [38 Cal. Comp. Cases 500, 512]; *Bland v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 324, 328–334 [90 Cal. Rptr. 431, 475 P.2d 663, 35 Cal. Comp. Cases 513].) “[I]t is an often-stated principle that the Act disfavors application of formalistic rules of procedure that would defeat an employee's entitlement to rehabilitation benefits.” (*Martino v. Workers' Comp. Appeals Bd.*, (2002) 103 Cal. App. 4th 485, 490 [126 Cal. Rptr. 2d 812, 67 Cal. Comp. Cases 1273].) In short, unless otherwise compelled by the law, the Appeals Board will not elevate form over substance.

Having reviewed the arguments in the petition for reconsideration and the contents of the WCJ’s report, we are not convinced that irreparable harm will occur in this case. Accordingly, we will deny the petition to the extent that it seeks removal.

Accordingly, as our Decision After Reconsideration we will affirm the April 22, 2021 F&O.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings of Fact and Orders issued on April 22, 2021, is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 26, 2024**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**OCTAVIO GARCIA  
GARRETT LAW GROUP  
LAW OFFICE OF ALBERT & MACKENZIE**

**EDL/00**

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*